there is no need to repeat it.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that this appeal ought to be dismissed and that the appellant ought to pay the first respondent's costs.

Appeal dismissed.

Solicitors: *Stephenson Harwood; Philip Conway Thomas & Co.*

LIM YOKE FOO v. EU FINANCE BERHAD

[P.C. (Lord Diplock, Lord Edmund-Davies, Lord Bridge of Harwich, Lord Brightman and Lord Templeman) October 29 & November 21, 1984]

[Privy Council Appeal No. 18 of 1983]

Land Law – Order of sale made by Collector of Land Revenue – Error in order – Power of Collector to correct error or to postpone sale – No power to cancel order and issue a fresh order for sale – Second order a nullity – National Land Code, ss. 260-266.

In this case the appellant had charged certain lands as security for a loan in favour of the respondents. The respondents took steps to enforce the charge in default of payment and in 1976 the Collector of Land Revenue after enquiry made an order for the sale of the lands by public auction specifying the amount due to the respondents at the date of the order was $443,694.52 and fixing the reserve price at $507,000. By an error only 12 instead of 20 titles were set out in the Schedule. The appellant filed a notice of appeal against the order and the Collector then purported to cancel the sale. The appeal was later withdrawn and the respondents requested the Collector of Land Revenue to proceed with the sale. The then Collector of Land Revenue purported to make and issue another order of sale in 1979, specifying the amount due to the appellant as the same as that stated in the first order but fixed the reserve price at a higher figure of $562,000, and scheduling all the 20 titles. This second order purported to find that the amount due to the respondents was precisely the same sum as had been found due in June 1976, with nothing added for intermediate interest. The appellant sought to take advantage of this obvious mistake and paid the sum stated. The Collector then purported to cancel the sale. The appellant brought an action claiming that the charge had been redeemed and demanding the title deeds.

The respondents counterclaimed for a declaration that the 1976 order for sale was still subsisting and sought judgment for the full amount of principal and interest. The learned Judge of the High Court found in favour of the appellant and ordered the respondents to execute a memorandum of discharge. On appeal to the Federal Court, the Federal Court held that the Collector had no power to cancel the 1976 order of sale and that the said order on which the appellant relied was a nullity and devoid of any effect. The Federal Court set aside the judgment of the trial judge and held that the respondent was entitled to payment of his claim with accrued interest ([1982] 2 M.L.J. 37). The appellant appealed.

Held: (1) the Federal Court was right in holding that the Collector had no power to cancel an order for sale made under section 263(1) of the National Land Code. Therefore the 1976 order remained on foot and the 1979 order was no order at all and was a nullity and devoid of any effect;

(2) an essential prerequisite of an order of sale under section 263 of the National Land Code was that there should be an application by the chargee for such an order. Another essential is that the Collector should hold an enquiry pursuant to section 261. In this case the 1979 order was not preceded by an application by the chargee nor was there an enquiry held. The Collector therefore had no right as between the lender and the borrower to make the 1979 order and the order was hopelessly bad.

Case referred to:

(1) *Subramaniam* v. *Muthiah Chetty* [1934] M.L.J. 222.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

D. Widdicombe Q.C. (M.A. Krishnan with him) for the appellant.

D.K. Rattee Q.C. (Zainudin Ismail with him) for the respondents.

Cur. Adv. Vult.

Lord Brightman (delivering the judgment of the Board): This appeal from a decision of the Federal Court of Malaysia arises in the context of an application by a chargee of land for an order for sale under the National Land Code. Such an order takes a statutory form, which includes a finding of the sum of money due to the chargee. As a result of an administrative mistake the order for sale in the present case was followed by a second order for sale which purported to record a finding of a smaller amount of indebtedness than the first order. The defaulting debtor seeks to redeem on payment only of the smaller sum due under the second order. His claim succeeded at first instance, but was rejected by the Federal Court.

In September 1974 Lim Yoke Foo, trading as the Syarikat Puchong Industrial and Development Company, to whom their Lordships will refer as "the borrower", applied to Eu Finance Berhad ("the lender") for a three month loan of

$350,000, at 15% per annum interest, secured upon twenty parcels of land in the Mukim of Kuala Kuantan of which the borrower was the registered proprietor under a Land Office title. The application was acceptable to the lender, and on October 10, 1974 an instrument of charge was signed by the borrower in Form 16A prescribed by section 242 of the National Land Code, charging the land with repayment of the loan on December 21, 1974 with interest. On 20th December the borrower applied to the lender for a three month extension of the loan at an increased rate of interest. This was agreed by the lender, the loan thus becoming repayable on March 23, 1975. The borrower defaulted, and on April 29, 1975 the lender's solicitors gave the borrower notice of default in Form 16D prescribed by section 254.

The procedure to be followed on realisation of a charge on land held under a Land Office title is laid down by sections 260 to 266 of the National Land Code. Under section 260(2) the chargee is required to make an application for an order for sale in Form 16G. The application is addressed to the Collector of Land Revenue in the district in which the land is situated. Upon receiving the application the Collector is required by section 261 to appoint a time and place for the holding of an enquiry, to notify the chargee of the time and place so appointed and to cause a summons to be served on the chargor. Under section 263, at the conclusion of the enquiry the Collector is required to order a sale of the land unless he is satisfied of the existence of cause to the contrary. His order is to be in Form 16H and is to provide for an auction sale; it must specify the date of the sale; it must specify the amount due to the chargee at the date on which the order is made; and it must fix a reserve price, being a price equal to the market value of the land as estimated by the Collector. Under section 264(3) the Collector has power to postpone a sale if he thinks it expedient to do so. Section 266(1) defines the right of the chargor to redeem before sale. The sub-section, so far as material, is in the following terms:—

"Any chargor against whom an order for sale has been made under this Chapter may, at any time before the conclusion of the sale, tender the amounts specified in sub-section (2) to the . . . Collector . . . and the order shall thereupon cease to have effect."

The amounts specified in sub-section (2) are, in effect, principal, interest and expenses.

The National Land Code also contains certain general provisions relating to enquiries and decisions or orders of the Collector made therein. Section 33 provides that save in the special circumstances specified in section 34:—

". . . a decision or order of the Collector in any enquiry shall not be altered or added to except for the purpose of correcting verbal errors or remedying some accidental defect or omission not affecting a material part of the enquiry."

The "special circumstances" include the case of a hearing being conducted in the absence of a necessary party. An enquiry cannot however be reopened under this section more than three years after the date on which the decision or order therein was first given or made. Under section 37 an appeal lies to the High Court from any decision or order given in an enquiry in accordance with the provisions of section 418. The latter section allows an appeal only within a time limit of three months.

On September 18, 1975 the lender made an application to the Collector in Form 16G (section 260) for an order for sale. The Collector held an enquiry pursuant to section 261, and at the conclusion thereof made an order in Form 16H pursuant to section 263. The order is dated June 15, 1976. It recited that the Collector had "made enquiry on the application of the chargee under the charge described in the Schedule below of the land so described". It directed that the sale should be by public auction to be held on August 5, 1976, and that the reserve price should be $507,000. It recorded the finding of the Collector that the amount due to the lender at the date of the order was $443,694.52. This accordingly became the sum which, under section 266, the borrower had the right to tender to the Collector, with interest and expenses, at any time before the conclusion of the sale, thus rendering the order for sale ineffective. By mistake the schedule to the order specified only twelve of the twenty parcels comprised in the Charge.

On June 18, 1976 the borrower lodged an appeal against the order for sale, objecting to the rate of interest. This led to the postponement of the auction which was due to be held about two weeks later.

On June 22, 1976 the lender's solicitors wrote to the Collector drawing attention to the missing eight titles, and requesting him to amend Form

16H. The Collector replied on June 30, accepting the complaint and stating that ". . . it is confirmed that the total number of titles involved in this order of sale is twenty titles in all". The letter then described the twenty titles by their title numbers.

In June 1978 the borrower, having successfully postponed the sale for two years and avoided paying interest in the meantime, applied to the High Court for the withdrawal of his appeal. On December 20, 1978 the lender's solicitors wrote to the Collector stating that the appeal had been withdrawn but that they were having difficulty in obtaining a copy of the court order.

They added:–

"However, we shall be glad to obtain your approval so that sale of the said land could be commenced as soon as possible. . ."

The solicitors wrote again to the Collector on February 13, 1979, on this occasion enclosing a copy of the court order. Finally on February 21, 1979 they wrote as follows:–

". . . we enclose herewith once again a copy of the said court order for your further action and fixing of the date of sale by public auction of the property concerned. For your information we also wish to mention that the debt which is still due to our client was $590,939.04 as on 30 September 1978. After that date an interest of $175.00 a day will be added until settlement of the said debt is completed."

A further ten months elapsed, until on December 26, 1979 the following purported order issued from the office of the Collector. This is the document which has caused the litigation. It reads as follows:-

"ORDER OF SALE AT THE REQUEST OF THE CHARGEE

I, Zainal Kassim bin Datuk Darus, Collector, having made enquiry on the application of the chargee under the charge described in the schedule below of the land so described and being satisfied that no cause to the contrary exists;

Hereby, in the exercise of the powers conferred by section 263 of the National Land Code, order the sale of the said land;

And I further order –

(a) that the sale shall be by public auction, to be held on January 31, 1980 at 10.00 a.m.

(b) that the reserve price for the purpose of the sale shall be $562,000.00

I find that the amount due to the chargee at this date is $443,694.52.

Dated this 26th day of December, 1979".

It will be observed that the Collector purported to find that the amount due to the lender on December 26, 1979 was precisely the same sum as had been found due on June 15, 1976, with nothing added for intermediate interest.

The borrower sought to take advantage of this obvious mistake. On January 25, 1980, he paid the sum of $443,694.52 to the Collector, who thereupon cancelled the auction fixed for January 31. On April 26 the borrower issued a writ in the High Court claiming that the charge had been redeemed and demanding the title deeds. The lender counterclaimed for a declaration that the 1976 order for sale was still subsisting, and sought judgment for the full amount of the principal and interest due. The learned High Court judge found in favour of the borrower and ordered the lender to execute a memorandum of discharge. The ground of his decision, shortly stated, was that the 1979 order was fully valid and effective as an order defining the amount payable by the borrower on redemption, and that as the lender had not appealed within the time limit prescribed by section 418 of the National Land Code, it was bound by the order.

The lender appealed. Pending the hearing of the appeal it was agreed between the parties that the lender should execute a memorandum of discharge upon being paid the sum which was not in dispute, and that a sum equal to the disputed balance should be placed on deposit pending the determination of the appeal. The substantive question therefore is whether the money on deposit should now be released to the lender on the basis that the 1979 order was not an effective finding of the sum necessary to be paid by the borrower in order to redeem the charge; or whether the money should be released to the borrower on the basis that it was.

The Federal Court decided that there was no power under the National Land Code for a Collec-

tor to cancel an order for sale made under section 263(1). Therefore the 1976 order remained on foot and the 1979 order was "no order at all within and for the purposes of section 263 and is a nullity and devoid of any effect". The only powers of the Collector, once the 1976 order had been made, were to postpone the date of sale if expedient under section 264(3), or to correct verbal errors or remedy accidental defects or omissions, if not matters of substance, pursuant to section 33.

Their Lordships respectfully agree with the decision and reasoning of the Federal Court. Furthermore an essential prerequisite of an order for sale under section 263 is that there shall have been an application by the chargee for such an order in Form 16G. The 1979 order was preceded by no such application. Another essential is that the Collector shall hold an enquiry pursuant to section 261. The 1979 order was preceded by no such enquiry. Only at the conclusion of such an enquiry has the Collector jurisdiction under section 263 to order a sale. It inevitably follows that the Collector had no right, as between the lender and the borrower, to make the 1979 order. His duty, and his only jurisdiction, was to make the appropriate arrangements for the auction sale directed by the 1976 order but postponed. The 1979 order was hopelessly bad as between the lender and the borrower.

The appellant's Counsel argued that the 1979 order was good on the face of it, in the sense that it followed the wording of Form 16H and was sealed by an officer who had jurisdiction under the Statute to make such an order. Counsel relied on the decision of the Court of Appeal of the Straits Settlements in *Subramaniam* v. *Muthiah Chetty* [1], in which the Court upheld a sale carried out in purported pursuance of two orders which were bad and would have been set aside if an appeal had been lodged against them. It was held that the chargor was bound by the orders although made without jurisdiction, since he had not appealed against them, and the orders were valid on their face.

In the opinion of their Lordships this decision does not assist the borrower in his unmeritorious attempt to avoid payment of his debts. The point of the decision was that the invalidity of the orders, not being apparent on their face, did not affect the title of the purchaser. Otherwise, as the Court said:–

". . . we get the intolerable position that an auction purchaser has no security of title till the expiry of the limitation period, that the chargor who has discovered a flaw need not appeal and set the order aside but may lie by and use his knowledge at any time within the limitation period to set aside a sale of which he may not approve for other reasons. The root principle of the Torrens system is that the Register should be a mirror of title and that a purchaser should not have to search beyond the title. But no prospective purchaser would have the right to see these orders, and if he saw them, he would not be able to conclude that they are bad without going through the whole record of the case before the Collector which lasted over two years and considering every step. And in many cases the decision as to whether or not an order is bad would not be such an easy matter as it appears in this case. Yet even in this case there is nothing on the face of either of these orders by which an intending purchaser could see that they are bad."

In fact, the defendant in that case was both chargee and purchaser, and therefore might not have been prejudiced in the accepted sense by the invalidity of an order in which he had concurred. Their Lordships fully accept the general principle laid down in this case, but prefer to express no view on whether different considerations might apply where the purchaser is not a third party so that the sale is in effect a foreclosure.

Their Lordships mention that there is one other ground which appears fatal to the borrower's case. Under section 266 the statutory effect of tender to the Collector of the sum stated in the 1979 order, assuming it to be valid, was to cause that order to cease to have effect. Therefore after tender had been made the 1976 order, which plainly had not been cancelled because no one had jurisdiction to cancel it, stood alone in the field, unembarrassed by the existence of the 1979 order. Under the terms of the 1976 order a sale had to take place unless and until the borrower tendered to the Collector the proper sum of money due under the terms of *that* order. This the borrower did not do. Accordingly the lender could insist on a sale under the 1976 order in the absence of payment of the full amount due. In their Lordships' opinion that is an alternative route whereby the lender would have been entitled to recover the full amount justly due to it.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal ought to be dismissed and that the appellant ought to pay the respondent's costs.

Appeal dismissed.

Solicitors: *Macfarlanes; Stephenson Harwood.*